NAGARAJAN VEERAPPAN

v.

ANANTHAN PARAMA SIVAM & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 25-199-1987]
25 MAY 1989

DAMAGES: *Negligence - Injuries sustained - Loss of left leg then knee amputation - Section 28A(2) of Civil Law Act 1956, meaning of 'earnings' - Loss of future earning - Whether multiplier should be applied directly to multiplicand.*

The 1st defendant failed to turn up at the hearing of the case. In the absence of any evidence to the contrary, the defendant was found wholly to be blamed for the accident. The plaintiff sustained injuries whereby he lost his left leg.

It was agreed that damages for the fracture of the superior and inferior public rami in his right pelvis should be assessed at RM3,000 and that damages for the loss of his left leg through on above - knee - amputation should be assessed at RM50,000. There was also agreement on the quantum in regard to a few listed items of special damages claimed which includes the medical expenses at the private hospital where he had the amputation done.

The plaintiff also claimed under general damages for nursing care, artificial limb and also damages for loss of future earnings. The plaintiff was a crane driver, 39 years of age at the material time. There were disputes as to what was the plaintiff's actual earning at the time of accident. It was argued that mere allowances and allowances are not within the meaning of 'earnings'.

Held:

[1] There was no evidence shown that the plaintiff required nursing care for the rest of his life because of his partial disability, therefore the claim under general damages for nursing care was disallowed.

[2] There is clear inference from available facts that the plaintiff requires an artificial limb and that the limb would have to be replaced from time to time and that maintenance costs for the use of the several artificial limbs would also be incurred. In view thereof the Court awarded RM6,000 for the costs of 3 artificial limbs over the remainder of his life and RM100 a year maintenance of the artificial limbs for 20 years making it a total of RM2,000.

[3] The accident took place on 20 October 1987 after the amendment to s. 28A(2) of the Civil Law Act 1956 (which came into force on 1 October 1984). The amended provision of s. 28A(2) make no mention of pre-trial loss of earning, therefore there can be no separate head of pretrial loss.

[4] Under s. 28A(2)(c)(i) of the Civil Law Act 1956, the word "earning" is used in the sense of the plaintiff's "... earnings by his own labour or other gainful activity." It cannot be gainsaid that the various "allowances" paid to the plaintiff were gratuitous payments wholly unconnected with his work as crane driver. An employer may for various reasons, split the remuneration of an employee into this or that allowance but in the end it is the sum total of these payments that the worker gets for the work he puts in. That constitutes "earnings" in the context of s. 28(2)(c)(i).

[5] In assessing the loss of future earnings, the Court fell back on the figure given in the Workmen's Compensation Act that the loss of earning capacity for a similar permanent partial disablement is 60%. 60% of the plaintiff's earning at RM1,140 at the date of the accident would give a multiplicand of RM684 per month. Under the formula in s. 28(2)(d)(ii), the number of "years' purchase" for loss of earning is 8 years i.e. the multiplier. The Court is of the view that the multiplier should be applied directly to the multiplicand. Therefore, loss of future earnings from date of accident were assessed at RM65,664.

[6] Interest at 4% per annum was awarded on special damages from date of accident. Interest at 6% per annum was awarded on general damages from date of service of writ. No interest was awarded on loss of future earnings & artificial limbs. The plaintiff was also awarded costs.

Cases referred to:
Thrimalai & Anor. v. Mohamed Masry bin Tukiman [1986] CLJ (Rep) 756
Murtadza v. Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 215
R.J. McGuiness v. Ahmad Zaini [1980] 1 MLJ 304
Siti Rahmah binti Ibrahim v. Marrapan a/l Nallan Kounder [1989] 2 CLJ (Rep) 481
Lai Wee Lian v. Bus Service [1978] Ltd. [1984] 1 MLJ 325 at 327
Cunningham v. Harrison [1973] 1 QB 942

Legislation referred to:
Civil Law Act 1956, s. 28A(2)

For the plaintiff - Mathuram; M/s. Mathuram & Co.
For the defendants - Shan Gnasalingam; M/s. Daim & Gamany

JUDGMENT

KC Vohrah J:

The plaintiff on 20 October 1987 at about 6.20 a.m. rode a motor cycle along the Tikam Batu/ Kepala Batas main road. He was proceeding in the direction of Alor Setar. He stopped at a police barrier erected in the middle of the road when requested to do so by the police. He was on the correct side of the road and he stopped somewhere in the middle of his side of the road. After the police had allowed him to proceed the plaintiff engaged gear but suddenly he heard a banging sound and then he lost consciousness. There is no dispute that the first defendant, driving a motor lorry and proceeding in the same direction as the plaintiff, had knocked the motor cycle of the plaintiff. Nor is there dispute that the road was a straight and dry road and the weather then was fine.

The first defendant failed to turn up at the first hearing of the case. He also failed to turn up at the continued hearing of the case.

In the absence of any evidence to the contrary it is an inescapable conclusion that the first defendant's lorry had run smack into the plaintiff's motor cycle while it was stationary in the middle of both the plaintiff's and first defendant's correct side of the road near the police barrier. The road there was straight and dry. The weather was fine. There can be no question that the defendant was wholly to be blamed for the accident.

The plaintiff suffered several injuries in consequence of the accident. He was admitted to the District Hospital, Sungai Petani, and remained there for 6 days. He discharged himself after refusing to undergo an above knee amputation of his left leg. He went to Lam Wah Ee hospital instead and there he had the amputation done.

He has claimed for general and special damages.

General Damages - Pain and Suffering and Loss of Amenities.

It was agreed that damages under this heading for the fracture of the superior and inferior public rami in his right pelvis should be assessed at RM3,000 and that damages for the loss of his left leg through an above knee amputation should be assessed at RM50,000.

Special Damages on Agreed Items.

There was agreement on the quantum in regard to the following items of special damages claimed in para. 7 of the statement of claim:

1. Wearing apparel torn beyond use RM60.
2. Travelling expenses for the family to visit the plaintiff while he was hospitalised as from 28 October 1987 to 1 November 1987 (5 days) at District Hospital Sungei Petani at RM10 per ... RM50
3. Costs of a pair of crutches ... RM20
4. Repairs of motor cycle ... RM535
5. Travelling expenses for family to visit the plaintiff while he was hospitalised at Hospital Lam Wah Ee from 1 November 1987 to 29 November 1987 (29 days) at RM10 per day ... RM290
6. Medical expenses at Hospital Law Wah Ee where he had the amputation ...RM2,500

General Damages - Nursing care

Counsel for the plaintiff argued that the plaintiff was entitled to nursing care for the rest of his life because of the above knee amputation that the plaintiff had. There was no evidence that he required the same for his partial disability and I disallow this item of damages.

General Damages - Artificial Limb

Counsel for the plaintiff also requested for damages in respect of an artificial limb for the plaintiff, with renewals and maintenance thereof. No evidence was adduced on this item of damages. But it is a clear inference from available facts that the plaintiff requires an artificial limb and that the limb would have to be replaced from time to time and that maintenance costs for the use of the several artificial limbs would also be incurred. In *Thrimalai & Anor. v. Mohamed Masry bin Tukiman* [1986] CLJ (Rep) 756 at 759 Shankar J considered RM2,000 a fair award for the cost of an artificial limb and RM100 a year for its maintenance. I do not think the cost of an artificial limb and the cost of its maintenance for the plaintiff in Kedah would be any different. I would give RM6,000 for the costs of 3 artificial limbs over the remainder of his life and RM100 a year for maintenance of the artificial limb for 20 years making it a total of RM2,000.

Damages For Loss of Future Earnings No Pre-trial Loss of Earnings under s. 28A(2) of Civil Law Act 1956

Since the accident took place on 20 October 1987, I would have to bear in mind the provisions of s. 28A(2) of the Civil Law Act 1956 (Act 67) (added by Act A 602 and which came into force on 1 October 1984) when I assess the loss of future earnings.

Pre-trial loss of earnings for claims arising under the pre-amendment law were and may be claimed as special damages (see *Murtadza v. Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 215) calculated from the date of accident to the date of trial.

The provisions of s. 28A(2), made in 1984, make no mention of this head of damages; and all relevant provisions for the purpose of calculating loss of future earnings refer to the age at the date of accident and not to the age at the date of trial as the figure. It seems to me therefore that there can be no separate head for pre-trial loss.

Earnings At Time of Accident

At the time of the accident the plaintiff had not attained the age of 55 years.

There is no dispute that he was in good health then. And he was receiving earnings by gainful activity. He is therefore entitled to loss of future earnings bearing in mind s. 28A(2)(c)(i).

PW2, his employer at the time of the accident, stated that the plaintiff, per month, received as a crane driver a basic salary of RM400, a petrol allowance of RM200, and a food allowance of RM150. Thus there was a fixed income of RM750 per month. PW2 also stated that the plaintiff was paid in addition RM15 per day for every "assignment" that was performed and that was for most of the time, coming to an average of 26 days of "assignment" in a month. This would mean that he had RM390 extra per month. And according to the employer the plaintiff also received overtime payment but there was no evidence as to how this was quantified. The employer said that the plaintiff was paid for 6 months up to the end of November 1984 and he said that of the 6 months the plaintiff received less than RM1,000 for 2 months. Unfortunately he was not asked which of the 2 months the plaintiff had received less than RM1,000 but bearing in mind that the accident had taken place on 20 October 1987 the affected months were most probably October (the last 11 days) and the month of November where the variable allowance of RM15 per day assignment and overtime could obviously not have been paid. In the circumstances the average income he received before the accident would appear to have been RM1,140 per month.

Defence Counsel, however, argued that the plaintiff's earnings were in effect only RM400, the amount being the "salary" that the employer paid to the plaintiff; the other payments being in respect of mere allowances and allowances are not within the meaning of "earnings". The word "earnings" used in s. 28A(2) is not defined. Under s. 28A(2)(c)(i) the word is used in the sense of the plaintiff's "... earnings by his own labour or other gainful activity." It cannot be gainsaid that the various "allowances" paid to the plaintiff by his employer before the accident arose from and were a measure of the work put in by the plaintiff as a crane driver with the employer; they were not gratuitous payments wholly unconnected with that work. An employer, may, for various reasons, split the remuneration of an employee into this or that allowance but in the end it is the sum total of these payments that the worker gets for the work that he puts in that constitutes "earnings" in the context of s. 28(2)(c)(i). In the circumstances I would assess his earnings at the date of the accident as RM1,140

Multiplicand Taking Into Account Partial Loss of Earning Capacity

In assessing the post trial loss I would have to consider that the plaintiff has only a permanent partial disablement and that he is likely to have gainful employment although the work he would be able to put in would be only of a light nature. In the Workmen's Compensation Act 1952 (Act 273) the minimum percentage of loss of earning capacituy for the loss of a leg above or at the knee is given at 60% (see the First Schedule to the Act).

In *R.J. McGuiness v. Ahmad Zaini* [1980] 1 MLJ 304, a Brunei case, Roberts CJ examined the Brunei Workmen's Compensation Enactment which rated the loss of a leg as constituting also a disability of 60% his Lordship, however, declined to use the figure in the case before him as his Lordship felt the legislation catered for unskilled labourers with little ability to switch to other work and not for an intelligent and determined man like R.J. McGuiness, the plaintiff in that case, who he felt was capable of much more than unskilled, repetitive manual work; he assessed the plaintiff's loss of earning capacity at approximately one third. In the instant case however I see little prospect of the plaintiff being able to get other than a sedentary job in this country. There is nothing to show that he has the educational pre-requisities to land himself a good job. Again, in the absence of any evidence showing the extent of the loss of earning capacity, I would think that it would not be wrong to fall back on the figure given in the Workmen's Compensation Act that the loss of earning capacity for a similar permanent partial disablement is 60%. 60% of his earnings at RM1,140 at the date of the accident would give a multiplicand of RM684 per month.

He was 39 at the time of the accident. Under s. 28A(2)(d)(ii) of the Civil Law Act the number of "year's purchase" is 55-39/2=8 years. This is the multiplier.

Should the multiplier be applied directly to the multiplicand or be applied indirectly to it through the use of an annuity table? My learned brother Abdul Malek J in *Siti Rahmah binti Ibrahim v. Marrapan a/l Nallan Kounder* [1989] 2 CLJ (Rep) 481 at p. 486 is of the view that the multiplier should be applied directly to the multiplicand. I respectfully agree with his view.

In setting out the procedure for arriving at the "years' purchase" (the multiplier), the statutory provision has not expressly indicated whether the figure arrived at should be used as a direct multiplier of the multiplicand or that it be used in conjunction with an annuity table. But it is clear that the years' purchase as given in the formula is not a straight subtraction of the plaintiff's age at the time of the accident from the base figure of 55 which Parliament seems to think should be the retiring age for all in Malaysia; the remainder has to be divided by two.

Now, s. 28A came into effect on 1 October 1984. Claims in respect of pre amendment loss of future earnings have a different basis for the reckoning of the plaintiff's year of purchase, the anticipated duration of the prospective loss of earnings of the plaintiff. First, the figure for working years of the plaintiff is calculated. Quite often this is done by subtracting from the normal retiring age (which the Courts have judicially considered in Malaysia as roughly 55) the age of the plaintiff at the date of trial. The figure that is obtained is then reduced.

The figure that is obtained is reduced to allow for two factors, the contingencies factor and the advance payment factor. These two factors have been explained by Lord Fraser of Tullybelton in the case of *Lai Wee Lian v. Bus Service [1987] Ltd.* [1984] 1 MLJ 325 at 327. Lord Fraser took 28 years as the number of years after the date of trial during which the appellant in that case could be expected to live and explained.

> The figure of 28 years must be discounted to allow for **two factors** (Emphasis mine) What is the nature of these two factors?

The **first factor** as to contingencies is stated thus:

> First there are the inevitable contingencies and uncertainties of human life and working capacity. Quite apart from this action, the appellant might have died or have been incapacitated by some other accident or by illness at any time during the 28 years. The chance of any of these things happening is entirely unpredictable in any individual case.

The **second factor** as to advance payment is stated this:

> The second factor is more susceptible of measurement; it is that the earnings which the appellant is assumed to have lost would have been spread over her whole future working life whereas any award of damages will be paid to her as a lump sum now. Some discount is required in respect of this early payment.

After taking into account these two factors, the reduced figure is obtained as a multiplier which is then applied directly to the multiplicand.

This is done thus:

> The practice in England is to allow for both these factors (contingencies and advance payment) together by reducing the figure for the multiplier substantially below the number of years during which earning capacity is assumed to have been diminished, and applying the reduced figure as a direct multiplier. For example if, in the present case, the chosen multiplier were 10 years and the multiplicand was RM7,200 per annum (i.e. RM600 x 12) the total award under this item would be RM72,000.

As above stated the reduced figure is used as a direct multiplier of the multiplicand. It is not used indirectly in conjunction with an annuity table. And to understand why this is not so done the nature of an annuity table has to be appreciated. A set of tables entitled "Table Computing Capital Sums Required When Invested at 5% Interests per Annum to Provide Monthly Payments Given Period of Years" was made available to the Board in the Privy Council and Lord Fraser commented:

> The tables are simply arithmetical tables showing results of certain labourious calculations always on the assumption that a sum, whether received in damages or in any other way, is invested at 5% interest. The calculations are not correctly described as "actuarial; they involve no element of judgment, actuarial or other, except the arbitrary choice of 5% as the assumed for rate of interest.

The rationale for using annuity table is stated thus:

> ... they are calculated upon the assumption that the capital sum (i.e. the sum awarded as damages) will be invested and will earn interest at 5% per annum. Interest at that rate on the gradually declining capital sum is assumed to be available to increase the capital cum awarded. In that way the fact that payment is being made in advance is wholly or partially allowed for, and it is therefore incorrect to made a further allowance for the payment in advance, in the way, or at least to the extent, that is done in England.

In other words annuity tables should not be resorted to where the period during which the injured party, the plaintiff, can be expected to work is reduced to take into account the advance payment, otherwise there would be a double deduction made for advance payment.

In respect of claims arising prior to the amendment Malaysian Judges had and have a discretion, in accordance with precedents, to decide what the multiplier ought to be; and from decided cases it is clear that it was normal to read of the contingencies factor, though not necessarily of the advance payment factor, being taken into account. And on account of that contingencies factor, the figure gets partially reduced by roughly a third (i.e. retiring age minus age at time of trial x 1/3).

The formula given in s. 28A(2)(d)(ii), however, removes the discretion of the Judge and fixes the procedure for ascertaining a reduced figure through a statutory formula; age of 55 minus age at time of accident x ½. The reduction is by half, and thus the reduced figure is considerably less than the figure that can be obtained through a roughly reduction given by Judges after discounting the factor of contingencies for per amendment claims. It seems clear

to me that with the introduction of the statutory formula which further reduces the value of the anticipated loss from the date of the accident Parliament must have taken into account the factor of contingencies as well as the factor of advance payment when it introduced the formula. In fact in not allowing for pre-trial loss to be claimed as an item of special damages (as was explained earlier in the judgment) the damages allowable in respect of pre amendment claims become subsumed in the damages that become due on the statutory formula leaving the defendant less damages than he would have got for pre amendment claims. In the circumstances the figure that is arrived at after using the formula in s. 28A(2)(d)(ii) must be used as a direct multiplier of the multiplicand.

Under the formula in s. 28(2)(d)(ii), as was mentioned earlier, the number of "years' purchase" for loss of earnings is 8 years. Applying 8 directly to the multiplicand of RM684, loss of future earnings therefore comes to RM65,664.

Deduction of Earnings Received During Pre-trial Period

An award for loss of earnings under the statutory formula covers the period starting from the date of accident and ending at the time of the plaintiff reaches the age of 55. This period therefore includes the pre-trial period i.e. the period starting from the date of the accident and ending at the date of trial.

It would appear that if the plaintiff should have recovered any wages during this period the gross award of earnings calculated on the longer period until he reaches the age of 55 under the statutory formula should be reduced to take into account these earnings. The plaintiff was injured on 20 October 1987. For October he received the fixed amount of RM750 for the whole month; so for the pre-trial period from the date of accident when he ceased work to 31 October he received about 1/3 x RM750 = RM250. For the month of November it would appear he received RM750. There is no evidence adduced, however, that the employer of the plaintiff in this case was obliged in law to make the payments that he made to the plaintiff after the accident. My view is that the payments were made *ex gratia* and should not be deducted from the award of damages (see *Cunningham v. Harrison* [1973] 1 QB 942).

I therefore give to the plaintiff as follows:

A. Special damages agreed item RM3,455

B. General damages:

i. Agreed damages for fracture of superior and inferior pubic rami in right pelvis RM3,000

ii. Agreed damages for loss of left leg RM50,000

iii. Cost of future use of 3 artificial limbs and their maintenance RM8,000

iv. Loss of future earnings from date of accident RM65,664

Interest should run on item A from date of accident to judgment at 4%.

Interest should run on items B(i) and (ii) from date of service of writ to judgment at 6%. Costs to be taxed.

Also found at [1989] 2 CLJ 1243